No. 9020

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED. KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER, M. E. DAY, ERNEST P. GANAHL, FRANK BAUM and JOSEPHINE BAUM, husband and wife,

Appellants,

vs.

ANAHEIM FIRST NATIONAL BANK, a national banking corporation,

Appellee.

APPELLANTS' REPLY BRIEF TO APPELLEE'S FURTHER BRIEF.

EDW. C. PURPUS,
430 L. A. Stock Exchange Building, Los Angeles,
Attorney for Appellants.

FILED

Parker & Baird Company, Law Printers, Los Angeles.

AUG 1 1939

PAUL P. O'BRIEN

TOPICAL INDEX.

PAGE

Reply to Appellee's Contentions re Appellants' Jurisdictional Statement 2

Definition Negative Pregnant 15

Conclusion 17

TABLE OF AUTHORITIES CITED.

Cases.

PAGE

Andrews v. State ex rel. Blair, etc., 178 N. E. 581 16
Coast National Bank v. Bloom (N. J.), 174 Atl. 576 5
Delano v. Butler, Receiver of Pacific National Bank, 118 U. S. 634 5
DeLeonis v. Walsh, 140 Cal. 182, 73 Pac. 813 13
Duddy-Robinson Co. v. Taylor, 242 Pac. 21, 137 Wash. 304 12
Ethel D. Company v. Industrial Acc. Comm., 219 Cal. 699 13
Fallgatter v. Citizen's National Bank, 11 Fed. (2d) 383 9
Ford v. Cotton, 82 Cal. App. 675 14
Fritz v. Mills, 170 Cal. 449 14
Green v. Frahm, 176 Cal. 259 13
Hartford v. Pac. Mut. Tr. Co., 16 Cal. App. (2d) 378 13
Heath et al. v. Turner et al., 77 S. W. (2d) 9 16
Johnston v. Russell, 37 Cal. 670 13
Markus v. Austin (Tex.), 284 S. W. 326 10
Page v. Jones, 7 Fed. (2d) 541 10
Reed et al. v. Mobley etc. (Ga.), 157 S. E. 321 6
Schramm v. Bank of California, 20 Pac. (2d) 1093 10
Sherman and Ellis v. Indiana Mut. Casualty Co., 41 Fed. 588; cert. denied 51 S. Ct. 107, 282 U. S. 893, 75 L. Ed. 787 12
Smith v. Bach, 183 Cal. 259 13
Texas Co. v. Bank of America, 5 Cal. (2d) 35 12
Town of Meredith v. Fullerton, 139 Atl. 359, 83 N. H. 124 12
United Air Services, Ltd., v. Sampson, 96 Cal. App. Dec. 13 16
Utley v. Clarke, 16 Fed. Supp. 435 7
Wagner v. El Centro Seed etc. Co., 17 Cal. App. 387 13
Wasserman v. Sloss, 117 Cal. 431, 59 Am. St. Rep. 209, 38 L. R. A. 176, 49 Pac. 566 13
Wood v. Imperial Irri. Dist., 216 Cal. 748 .... 6, 7
Wright v. Gurley, 63 So. 310 5

Statute.

New Federal Rules of Civil Procedure, Rules 1 and 2 2

Text Books and Encyclopedias.

24 California Jurisprudence 986 .... 13, 14
Witkin's Summary of California Law, Sec. 2(d), p. 919 15

No. 9020

In the United States Circuit Court of Appeals

For the Ninth Circuit.

L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED. KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER, M. E. DAY, ERNEST P. GANAHL, FRANK BAUM and JOSEPHINE BAUM, husband and wife,

Appellants,

vs.

ANAHEIM FIRST NATIONAL BANK, a national banking corporation,

Appellee.

APPELLANTS' REPLY BRIEF TO APPELLEE'S FURTHER BRIEF.

The appellee, in its "Introductory," aside from a quite unnecessary allegation as to a purported defective record on the part of the appellants, merely invites the court's attention to the fact that certain portions of appellants' second opening brief are reprints, or substantial restatements, of matters appearing in their original opening

brief. The appellants felt that this Honorable Court was entitled to every consideration, and, therefore, reprinted much of their original opening brief in order to save time and the inconvenience of constant references to the original opening brief.

Reply to Appellee's Contentions Re Appellants' Jurisdictional Statement.

Appellee in its earlier brief, on pages 2 and 3 thereof, alleged that this action would fall on the law side, not in equity, and they repeat this by reference in their further brief. In so doing the appellee obviously failed to take into consideration Rules 1 and 2 of the New Federal Rules of Civil Procedure.

The appellee in its further brief objects to appellants' statement contained on page 6 of appellants' second opening brief, that the new Federal Rules of Civil Procedure are applicable to the above cause. Since this Honorable Court did on the 10th day of May, 1939, decide that the instant case falls under the new Federal Rules of Civil Procedure this objection has been ruled upon, and is now *res adjudicata*.

——— : ———

As in appellants' opening brief, we again object to appellee's statement that "the only time this method of repairing the impaired capital of a national bank had been used was about 1929 and that was in connection with another bank in his territory—the First National Bank of Huntington Beach, which was later merged into a state bank. It was his idea. The office of the Comptroller of the Currency never indicated approval of this as being a

proper method to repair impaired capital nor did it notify disapproval to him. (*Ibid.* pp. 99-100-103.)"

As a matter of truth, R. Foster Lamm testified as to the attitude of the Comptroller's Department on the matter as follows: "Well, I would have to say that they did not disapprove it when it worked." (S. T. 100.) As a matter of fact when counsel for the appellee asked R. Foster Lamm as to whether or not he had ever specifically set forth the plan to the department and asked for their approval or disapproval, he made this answer: "Only as an accepted fact." And when he was asked whether he had ever had an answer from the Comptroller's office as to that being a proper method of repairing impaired capital, he answered: "I never." Pressed by the question: "No answer one way or the other?" he replied: "I do not remember that there was." (S. T. 100.)

The appellee on pages 6, 7, 8 and 9 of its further brief goes into a prior transaction which has no bearing upon the case at bar. The appellants cannot be bound by any correspondence relating to any other transaction than the one involved in this case.

We respectfully urge that the appellee's own conclusion as set forth on page 9 of its further brief in regard to the Deputy Comptroller has no place in a brief.

In regard to appellee's remark on page 10 of its further brief in speaking of Waldron's testimony in that "He does not think they ever kept such a record on the official books of the bank," we submit that Mr. Waldron's exact testimony in this regard appears on page 181 of the supplemental transcript of record and in answer to that very question reads as follows: "I think not on the official books of the bank. Whether they did by memorandum

or not, I am not sure." Further down, on the same page, in answer to the question as to whether or not the directors kept a set of books among the bank books, he made this reply: "I think not. They kept the record." It is also to be noted from Mr. Waldron's testimony, appearing on page 178 of the supplemental transcript of record, that in his report of December, 1930, the program that had already been put into effect at a prior date along exactly the same lines as the one in this case *went through to the Comptroller's office, and nowhere is it shown that the Comptroller's office took occasion to disapprove it.*

As to the plan of buying the depreciation in the bond account being submitted to Bank Examiner Lamm as mentioned on page 16 of appellee's further brief, it is to be noted that on page 97 of the supplemental transcript of record, Mr. Lamm left the district about the middle of 1930 and was replaced by Mr. Waldron as bank examiner, who did remember that the president of the bank took the matter up with him. [S. T. 178-179.]

——— : ———

On pages 17 and 18 of appellee's further brief it is reiterated that the Comptroller insisted, and used the word "must" in his letter of July 2, 1930. We again point out that this letter was in regard to a totally different transaction than the one involved before this Honorable Court, although a similar plan was at that time put into operation, and the Comptroller in that very letter informed them that *they could purchase for cash assets estimated by the Examiner as losses.*

On pages 21 and 22 of appellee's further brief, the question is taken up as to what constitutes cash assets estimated by the examiner as losses. On page 21 appellee defines them as "sour promissory notes" or "*securities of debased value.*" What does depreciation in a bond account make it but a "security of debased value?" (Italics ours.)

The appellee again cites cases already cited in its first reply brief. Again appellants fail to see where those cases are in any way applicable to the facts and circumstances existing in this case, or how they are in point. In the first case cited, *Delano v. Butler, Receiver of Pacific National Bank,* 118 U. S. 634, at page 650 thereof, it was expressly noted by the court that the plaintiff in error in that case *had by his own acts ratified the acts of the bank.*

In the case of *Coast National Bank v. Bloom,* 174 Atl. 576 (N. J.), there is no such agreement between the bank and its directors as that involved in this case, nor was the bank a party to the contract. This case is not in point.

The case of *Wright v. Gurley,* 63 So. 310, is not predicated upon any agreement such as is involved in our case, and cannot be taken as the law in this case.

Likewise, the other cases cited fail to set forth a set of facts and circumstances akin to the case at bar and are, therefore, not in point.

The appellee, in reply to Part V of appellants' argument on page 26, makes the bold statement that the "officers of the bank never even furnished the full text of the agreement to the Comptroller." We fail to find any authority for such a statement nor, indeed, does appellee pretend to offer one.

The appellee's attitude towards the agreement involved in this case is somewhat difficult to uncover. On page 26 of its further brief the statement is made "Formal claims had indeed been presented to and filed with the receiver, but such formal claims could rise no higher than the *legal basis upon which they were founded, and there being no legal basis for them, they were not valid or proper claims.*" Yet on the next page the statement is made: *"The question of unlawfulness arose only incidentally"* and also: "Appellee contended that appellants were not entitled to recover herein on the basis of any agreement of the sort and effect urged by them in their complaint, and that if in fact an attempt had been made to meet the Bank's precarious financial situation by the method provided for in such alleged agreement, *the same would have been unlawful because contrary to public policy and the rules governing the administration of national banks.* * * *" (Italics ours.) Appellants strongly disagree with the contention that the agreement was against public policy. If it was anything but a valid agreement, then it was merely *malum prohibitum.*

On pages 28 and 29 of appellee's further brief, an attempt is made to draw the cases of *Wood v. Imperial Irri. Dist.,* 216 Cal. 748, and *Reed et al v. Mobley, etc.,* 157 S. E. 321 (Ga.), into alignment with appellee's contentions, but this Honorable Court will note from a reading of these cases that they were both tried upon the theory that the money, in the one case deposited in the bank, and in the other case paid as an assessment to repair capital, was impressed with a trust, but the question was not raised as to recovery upon a contract because it was illegal and void. The appellants cited the case of *Wood*

v. Imperial Irri. Dist., 216 Cal. 748, by reason of the court's remark at page 759 which reads:

> "A contract void because it stipulates for doing what the law prohibits is incapable of being ratified."

In the case of *Utley v. Clarke,* 16 Fed. Supp. 435, the plaintiff testified that he had been asked by the president of the bank to loan the bank $25,000 to repair capital. Plaintiff was a director and vice-president. Plaintiff sold to the bank certain bonds in the amount of $25,139.25 and deposited that amount to his own account, then made a check payable, *not to the bank,* but to one Clarke, who was the president of the bank, and accepted the said Clarke's personal promissory note as collateral security therefor. Clarke, without plaintiff's knowledge, deposited plaintiff's check to his own personal account and then issued his (Clarke's) own personal check in the amount of $25,000 to the bank and wrote the Comptroller of the Currency that he had given his own check, and deposited same in surplus and undivided profits account. A record of a directors' meeting held a short time later showed that plaintiff was present and noted that a copy of such letter was read into the minutes of the meeting.

Plaintiff neither claimed a trust upon the part of the bank for his benefit, nor sought a preference over depositors or general creditors of the bank, but sought a judgment to share with them in the assets of the bank. The court found (p. 438), among other things, that:

> "As to defendant receiver's contention that plaintiff as vice-president and director was bound to know all that the books showed as to the transaction, and thus knew that the books showed no obligation of the bank to him, cannot be accepted as there stated.

Plaintiff was bound to know that he had delivered or sold the bonds to the bank and received a credit to his account of $25,139.25 and delivered a check for $25,000 to Clarke (and in this he is assumed to have relied upon Clarke's statement that such was the way the transaction could best be handled and the $25,000 added to the assets of the bank) but he cannot be fairly charged with knowledge of the deposit of the check in Clarke's account nor of the giving by Clarke of his check for the same amount to the credit of the surplus and undivided profits funds of the bank, nor of the letter written by Clarke to the Comptroller nor of what the bank books showed. *Wakeman v. Dalley,* 51 N. Y. 27, 32; 10 *Am. Rep.* 551; *Reno v. Bull,* 226 N. Y. 546, 124 N. E. 144; *Briggs v. Spaulding,* 141 U. S. 132, 147, 11 S. C. 924, 35 L. Ed. 662. Plaintiff could not recover against the bank if Clarke failed to carry out representations made to plaintiff in the manner in which the transaction would be handled. Plaintiff made Clarke his agent for the purpose of using $25,000 to aid the bank to show unimpaired capital and to remain open. If Clarke failed to do it in the way agreed upon or plaintiff expected, plaintiff cannot put upon the bank the duty of seeing that it was done as agreed" (p. 440).

The above clearly shows that the facts and circumstances in that case had nothing to do with such matters as are involved in this case. In that case the agreement was between two individuals, not between the bank and the plaintiff. Hence, this case is entirely out of point so far as appellee's contention is concerned. However, this case does go to show that the appellants are correct

in their contention as stated in Point II of their second opening brief.

In the case of *Fallgatter v. Citizens' National Bank*, 11 Fed. (2d) 383, discussed by the appellee in its further brief at pages 31 and 32, there was no agreement made with the bank as to reimbursement—no purchase of bad assets claimed, and the directors in that case advised the Comptroller of the Currency that they were familiar with its unsatisfactory condition. In the concluding paragraph of a letter to the Comptroller of the Currency they said:

> "In conclusion, we promise to get to work at once to place this bank in the position it should be, and, if necessary, to take out all such paper as might result in a loss in order that the bank may be in such condition as will meet with the approval of this Department."

There was various other correspondence to like effect and a notation made upon the "special assessment account" which read as follows:

> "And that no part hereof can be withdrawn for any other purposes than the payment of an assessment of 100% if and when a similar notice of impairment has been received from the Comptroller of the Currency."

The plaintiff in this case based his claim on the allegation that the money was a special deposit but was unable to prove that it was other than a special account and, as shown above, it was in fact so labeled. Hence it will readily be seen that this case is in no way in point with the present case.

The case of *Page v. Jones,* 7 Fed. (2d) 541, cited on page 33 of appellee's further brief deals with an alleged oral understanding between the plaintiff shareholder and various directors and officers of the bank. No such agreement was actually proven however, but if one did exist then it was purely an agreement between the officers and directors with the shareholders and not between the stockholders and the bank. It has no bearing upon our case whatsoever and is no more in point than are the others above discussed.

The same is true of the case of *Markus v. Austin,* 284 S. W. 326 (Tex.).

None of these cases can be cited as cases dealing with recovery upon illegal contracts.

In connection with recovery upon void and illegal contracts we wish to point out that the several cases heretofore cited by appellants in their second opening brief all hold that when a contract is expressly prohibited by law no court of justice will enforce the same. However, many cases have been decided as to the rights of recovery under such conditions where such contracts are not *malum in se* but are merely *malum prohibitum.* Perhaps, one of the best of these cases is the case of *Schramm v. Bank of California, a national association,* 20 Pac. (2d) 1093, at 1103, which sets forth a learned discussion of void agreements made in contravention of banking laws and as to recovery thereunder. We, therefore, quote:

> "(15, 16) The 1919 agreement does not mention percentages nor any specific pledges of collateral. The two banks could have readily performed their undertakings concerning pledges without violating any part of the 1925 act. We are aware of no reason for declaring that the provisions of that agree-

ment concerning previous conflict with the legislative act before us. The act condemns only excessive pledges. It will be observed from the statement of facts recited in a preceding paragraph that all of the collateral which the defendant possessed on December 3, 1926, had not come into its possession in a single moment. Scarcely a day passed when the Kenton Bank did not bring to the defendants' vaults a quantity of commercial paper, or withdraw some previously deposited. Thus, the amount in defendants' possession constantly fluctuated. When the Kenton Bank suspended business the defendants possessed such a large amount of collateral that its security exceeded the statutory limitation of 125%. The plaintiff demanded the surrender of these pledged assets, and the defendant refused. When the defendant insisted upon retaining all that it possessed, it for the first time announced an attitude in conflict with section 88. In our opinion that section of our law does not demand a holding that the defendant must forfeit all of its security. We believe that the purpose of that enactment will be fully served by requiring it to surrender all of the collateral which it possess in excess of the statutory limitation. * * *

It follows from the preceding that the defendant is entitled to retain a sufficient amount of the collateral in its possession to secure it to the extent of 125%, upon the three items which we have held constituted borrowings by the Kenton Bank (107,589.02). The record indicates the order in which the collateral was pledged with the defendant, and the subsequent disposition of the same. *All collateral accepted by the defendant after it had received the limit permitted by section 88, it must deliver to the plaintiff, or account for the proceeds of it.*" (Italics ours.)

To like effect is the case of *Sherman and Ellis v. Indiana Mut. Casualty Co.,* 41 Fed. 588, cert. denied 51 S. Ct. 107, 282 U. S. 893, 75 L. Ed. 787. We quote:

> "138 (3). Recovery of money paid or property transferred. C. C. A. Ind. 1930. Courts ordinarily permit property parted with, or services rendered on faith of unlawful contracts, to be recovered or compensated for."

The *Town of Meredith v. Fullerton,* 139 Atl. 359, 83 N. H. 124, decided the question as follows:

> "So long as illegal contract remains executory, party may disaffirm it or recover back money or property advanced thereunder."

The case of *Duddy-Robinson Co. v. Taylor,* 242 Pac. 21, 137 Wash. 304, found that:

> "Courts may grant relief on illegal contract, such as recovery of money paid, although parties are in *pari delicto*."

Another excellent case which deals with illegality of contracts and recovery thereunder is that of *Texas Co. v. Bank of America,* 5 Cal. (2d) 35, wherein, as in this case, there was lacking one of the essential elements of a valid contract, namely, a party capable of contracting. The Supreme Court held the contract to be void and the lessee entitled to recover the money paid to the lessor. The court found that the contract was *ultra vires* and "if the lease was void, respondent was entitled to a return of its payment for the lease. (*Schlicker v. Hemenway,* 110 Cal. 579; *Hellman v. Merz,* 112 Cal. 661)."

Another case on this point is *Green v. Frahm,* 176 Cal. 259, 260.

The same rule is laid down in the following cases:

Smith v. Bach, 183 Cal. 259, 263;

DeLeonis v. Walsh, 140 Cal. 182, 73 Pac. 813;

Wasserman v. Sloss, 117 Cal. 431, 59 Am. St. Rep. 209, 38 L. R. A. 176, 49 Pac. 566;

Johnston v. Russell, 37 Cal. 670.

——— : ———

Not one of the cases cited by the appellee in reply to appellants' Point VIII in their second opening brief is in point, since not one of the cases cited or quoted from was decided as to findings which were in form of negative pregnants.

The case of *Hartford v. Pac. Mut. Tr. Co.*, 16 Cal. App. (2d) 378, goes only into the question as to whether the evidence was sufficient to support certain findings which appellants claimed were conflicting, but there is no claim made, nor mention made of, such findings being negative pregnants.

The case of *Wagner v. El Centro Seed, etc., Co.,* 17 Cal. App. 387, at 389, as is shown by the portion quoted, is again as to apparent inconsistency between different portions of the findings, and does not deal with a negative pregnant.

The same is true as to the case of *Ethel D. Company v. Industrial Acci. Comm.* (1934), 219 Cal. 699, at 708.

The portion quoted from 24 *Cal. Jur.* at 986 is the law applicable to *inconsistent findings* and not as to negative pregnants. The law as to *negative pregnant findings* as

set forth in 24 Cal. Jur. will be found under that heading on page 976, and reads as follows:

> "A finding in the form of a negative pregnant, attempting to negative an affirmative allegation, implies the truth of such allegation."

Hence, it would seem that the appellee has quoted from the wrong section.

The case of *Ford v. Cotton,* 82 Cal. App. 675, gone into at length by the appellee, makes no mention of a negative pregnant, but is purely as to whether or not the court's findings were sufficient to support the judgment.

The case of *Fritz v. Mills,* 170 Cal. 449, also gone into extensively by the appellee, is also as to sufficiency in form of a finding, but not as to whether or not that finding is in form a negative pregnant. The finding complained of in that case was "that all of the denials and allegations contained in the answer of the defendants to said third amended complaint are, and that each and every one of them is, supported by the evidence and true." As stated in the syllabus, this form of finding has always been held sufficient, but neither the finding nor anything contained in the case has any bearing on the question of a negative pregnant.

The appellee, from page 34 to the end of page 40 of its further brief, has cited and quoted from many cases at length. However, since the other cases are no more in point with the question of whether or not the findings involved in this case are in form negative pregnants than are those which have already been discussed by the appellants, we do not see any reason to burden this court further by lengthy discussion of the same. Suffice it to say, that none of them deal with a negative pregnant finding.

Definition Negative Pregnant.

The definition of a negative pregnant finding is well set forth in *Witkin's Summary of California Law,* page 919, section 2 (d) and reads as follows:

> "Denials in these forms are considered evasive, and raise no issue. (1) A negative pregnant is a denial that implies an admission. Usually this is by reason of the fact that the denial is in the exact words of the allegation, and the allegation embraces several matters, so that the defendant denies merely the literal truth, and not the substance of the allegation. Thus, where plaintiff pleads an indebtedness 'in the sum of $1,000,' he admits, in effect, indebtedness in the sum, *e. g.,* of $999. The same is true of damages, value, quantity, etc.; a denial of the precise amount or number alleged is an admission of any lesser amount or number. A denial that plaintiff delivered 'all' of the materials agreed upon is a negative pregnant. (*Jones and Laughlin, etc. Co. v. Doble Co.* (1912), 162 Cal. 497, 123 P. 290.) So is a denial that goods were sold or delivered to defendant 'at plaintiff's mill in New Jersey' (admission that they might have been sold or delivered at another place). (*Janeway & Carpenter v. Long Beach Co.* (1922), 190 Cal. 150, 211 P. 6). (See also *Doll v. Good* (1869), 39 Cal. 287; *Boscus v. Bohlig* (1916), 173 Cal. 687, 162 P. 100; *Leffingwell v. Griffing* (1866), 31 Cal. 231; *Holcomb v. Long Beach Inv. Co.* (1933), 129 Cal. App. 285, 19 P. (2d) 31). (2) A *conjunctive denial* is a negative pregnant, and bad as such, which results where the complaint alleges several matters in the conjunctive, and the answer denies them in the same manner, instead of denying each averment separately. The effect of this evasive

> denial is that any averment might be true, even though all together may not be. Thus, 'Deny that said mortgage was, after the execution thereof, *and* on the 7th day of October, 1920, duly recorded,' is a conjunctive denial. (*Motor Inv. Co. v. Breslauer* (1923), 64 Cal. App. 230, 221 P. 700). (See also *Janeway & Carpenter v. Long Beach Co., supra; Woodworth v. Knowlton* (1863), 22 Cal. 164; *Richardson v. Smith* (1866), 29 Cal. 529.)"

A negative pregnant was contained in the findings in the case of *United Air Services, Ltd. v. Sampson,* 96 Cal. App. Dec. 13 (29). The case was reversed.

On page 42 of appellee's further brief, in reply to appellants' Point VIII, the appellee cites and quotes from the case of *Heath et al. v. Turner, et al.,* 77 S. W. (2d) 9, at page 12. While a reading of the quoted portion would seem to support the appellee's position, a reading of the entire case discloses that the facts are so far out of alignment with the instant case as to prevent the same being in point.

The same is true of the case of *Andrews v. State, ex rel. Blair, etc.,* 178 N. E. 581, and the cases therein cited.

——— : ———

Since the appellee has throughout its further brief referred to and reiterated parts of its first brief, appellants are constrained to and must incorporate in this, their reply to appellee's further brief, appellants' original reply brief *in toto.*

Conclusion.

The transcript of record, and the supplemental transcript of record, when thoroughly digested disclose that the appellants are entitled to a reversal of the judgment and decree of the District Court. Both the appellee's first brief and further brief attempt to evade the true issues involved in this case, but, in our opinion, none of the cases cited therein contravert the position of the appellants.

The conclusions recited in our opening brief need no reiteration. Either appellants have a valid contract and are entitled to what they purchased, or they are parties to a contract which is *malum prohibitum,* and are entitled to recover the money they paid thereunder. If any of the findings are in form negative pregnants they cannot support the judgment, and the case should be reversed. Under all these premises the appellants respectfully ask that the decree of the District Court be reversed.

Respectfully submitted,

Edw. C. Purpus,

Attorney for Appellants.